of jurisdiction and when I asked the Senior Federal Counsel if he wished to apply to amend the statement of defence he at once made an oral application for leave to amend the defence by insertion of the following two paragraphs after paragraphs 4 and 9 respectively of the statement of defence: —

"4A. The statement of claim does not disclose any cause of action and as such it should be struck out."

"9A. The High Court has no jurisdiction to go into the question of Article 5(3) of the Constitution by virtue of Article 128(2) of the Constitution."

The authorities lay down that the court does not readily allow at the trial an amendment the necessity for which should have been abundantly apparent months ago and was not then asked for, but sometimes amendments are allowed even at the hearing so that the entire range of litigation and dispute can be gone into. The other side can, of course, always be compensated by costs. I have already stated my views on the question of jurisdiction as far as the proposed paragraph 4A of the statement of defence is concerned. I am told by the learned Senior Federal Counsel that to substantiate that averment in the defence, if it is allowed, he is relying on Order 19 rule 27 of the Rules of the Supreme Court and no other provision of the Rules of the Supreme Court. Order 19 rule 27 of the Rules of the Supreme Court is in the following terms: —

"The court or a judge may at any stage of the proceedings order to be struck out or amended any matter ... or pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass, or delay the fair trial of the action; ...."

Applications under Order 19 Rule 27 should be made promptly and as a rule before the close of the pleadings otherwise the court may decline to exercise the discretion conferred by that rule. It is again the rule that the courts do not dictate to the parties how they should frame their case and this is a rule which, as has often been said, ought to be preserved sacred. Seeing the statement of claim, I am at a loss to understand how it can be said that any part of the statement of claim is either unnecessary or is scandalous or is such which would tend to prejudice, embarrass or delay the fair trial of the action.

I, however, do not wish to deprive the defendants of the opportunity to place before the court points which they wish to urge so that they may have the fullest opportunity to present their case and to attack the plaintiff's claim in any manner available to them. It is for these reasons and these reasons alone that I am going to grant the application for amendment but subject to the payment of costs.

We have already spent nearly two hours on arguments on the two applications. The costs of the applications and all costs incidental to the amendment will be taxed by the Assistant Registrar and paid by the defendants. The amended statement of defence should be filed by tomorrow. I see no reason why the suit cannot go on today.

The preliminary objection as to lack of jurisdiction of the court stands dismissed with costs.

Order accordingly.

Solicitors: *Karpal Singh, Wong & Co.*

YEOH TAT THONG v. GOVERNMENT OF MALAYSIA & ANOR.

[O.C.J. (Azmi L.P.) July 9, 1973]

[Kuala Lumpur — Federal Court Civil application No. 1 of 1973]

Constitutional Law — Jurisdiction of High Court — Application for declaration that subsidiary legislation is ultra vires and void — Not a challenge to validity of primary legislation — No leave of Federal Court required — Courts of Judicature Act, 1964, s. 48(1) — Federal Constitution, arts. 4, 128 and 160.

Practice and Procedure — Validity of subsidiary legislation — High Court — Jurisdiction.

The applicant intended to issue a writ of summons for declarations, *inter alia*, that subsidiary legislation made by the State Authority in Penang under the National Land Code was *ultra vires* and null and void. He applied to the Federal Court for leave to issue the writ.

Held: (1) the declarations to be sought in this case could not be said to come within the provisions of clauses 3 and 4 of Article 4 read together with Article 128 of the Federal Constitution, as the law which is to be challenged is not a primary law made by the State Legislature and the challenge will not be made on the ground that the matter has trespassed on the Federal sphere;

(2) the High Court has jurisdiction to deal with the matter even though the questions raised might have effect on any provisions of the Federal Constitution and therefore, no leave of the Federal Court was required.

Cases referred to:-

(1) *Oriental Holdings Sendirian Berhad* v. *Government of Penang and another* [1972] 2 M.L.J. 248.

(2) *Fernandez* v. *Attorney-General* [1970] 1 M.L.J. 262 at p. 264.

FEDERAL COURT.

Lim Kean Chye for the applicant.

Mohktar bin Haji Sidin (Senior Federal Counsel) for the Government of the Federation.

Abu Talib bin Othman (Legal Adviser, Penang) for the Director of Lands and Mines, Penang.

Azmi L.P.: The applicant, the registered owner of lands registered under Holdings 11, 12, 22 and 23, Town of Bukit Bendera, Penang, applies to me, a judge of the Federal Court, for leave to issue a writ of summons in the High Court, Penang, for the following declarations: —

1. A declaration that the plaintiff's lands registered as Holdings 11, 12, 22 and 23 Town of Bukit Bendara are not alienated lands within the meaning either of section 101 or section 102 of the National Land Code.
2. A declaration that paragraph 2(a) of the Schedule to the National Land Code (Penang and Malacca) Order 1965 and published as L.N. 478 in the *Federal Government Gazette* of 25.12.65 is *ultra vires* section 439 of the National Land Code and is null and void.
3. A declaration that the notification P.U. (A) 526 published in the *Government Gazette* on 25.12.69 by the Minister of Lands and Mines purporting to be made under section 439 of the National Land Code is *ultra vires* the said section and is null and void.
4. A declaration that the purported laws enacted by the State Authority of Penang by virtue of and under section 101 of the National Land Code and published in the *Penang Government Gazette* on 29.1.70 as Penang P.U. 4 of 1970 are null and void and of no operative effect.
5. A declaration that the purported laws enacted by the State Authority of Penang by virtue of and under

section 102 of the National Land Code and published in the *Penang Government Gazette* on 31.12.69 as Penang P.U. 49 of 1969 are null and void and of no operative effect

and he intends to cite the Government of the Federation of Malaysia and the Director of Lands and Mines, Penang, as respondents.

It is apparent why Mr. Lim Kean Chye for the applicant came to me, a judge of the Federal Court, for leave to bring this matter before the High Court in Penang. He, himself does not think that such leave is necessary. Counsel for the Government of the Federation of Malaysia and for the Director of Lands in Penang expressed the same view. Mr. Lim made this application out of respect to the view expressed by Chang Min Tat J. in *Oriental Holdings Sendiran Bhd.* v. *Government of Penang and Another.*[1] Mr. Lim assured me, that the facts of that case are substantially similar to those of the instant one and the law he would argue in the instant case would be practically the same law which he had argued in the other case. Mr. Lim explained that in reference to the first declaration he would argue that the applicant's lands are not "alienated" lands within the meaning of either section 101 or section 102 of the National Land Code and in reference to the second declaration he would argue that paragraph 2(a) of the National Land Code (Penang and Malacca) Order 1965 (published as L.N. 478) dated 16th December 1965 is *ultra vires* section 439 of the National Land Code and is therefore null and void. In so doing he would not be challenging the authority of the Yang di-Pertuan Agung in making the said Order of 1965. He would be merely saying that paragraph 2(a) of that Order contravened section 439 of the National Land Code. In the third declaration he would argue that the notification P.U. (A) 526 dated 25th December 1965 made by the Minister of Lands and Mines is also *ultra vires* that section, and in the fourth declaration, Mr. Lim would argue that the revision of rent purported to be made under section 101 of the Land Code and published as Penang P.U. 4 of 1970 is null and void on the ground that the land enumerated in the schedule is not alienated land. In the fifth declaration he would argue that the direction purported to be made under section 102 of the National Land Code and published as Penang P.U. 39 of 1969 is null and void. Again in reference to this question the arguments will be whether the applicant's land in question is alienated land. In other words he would not be arguing anything that would come within the provisions of clauses 3 and 4 of Article 4 of the Federal Constitution.

In my view, clauses 3 and 4 of Article 4 have reference only to suits where a challenge is made to the validity of primary legislation on the ground that Parliament has made a law which is on the State list, (see schedule 9 of the Constitution) or on the ground that a State has made a law which is within the Federal list. It is only in such suits (except where the proceedings are between the Federation and one or more States) that leave under clause 4 is necessary; and in view of Article 128 the Federal Court has exclusive jurisdiction to determine such question. Leave referred to in clause 4 is therefore leave to bring the matter before the Federal Court.

Section 439 of the National Land Code gives power to the Yang di-Pertuan Agung to make an order applying the provisions of the Land Code to Penang and Malacca and this order may be subject to such modifications as he may consider necessary or desirable and such order with any such modifications has to be made with the concurrence of the State Authority *i.e.* the Governor of Penang or Malacca. The provisions of the order therefore are modifications to the Land Code. In other words, these modifications are not law made by the State of Penang or by the State of Malacca within the meaning of the word "law" defined in Article 160 of the Constitution.

"Law" is defined there to include written law, the common law in so far as it is in operation in the Federation or any part thereof and any custom or usage having the force of law in the Federation or any part thereof.

"State law" means:

(a) any existing law relating to any matter with respect to which the legislature of a State has power to make law, being a law continued in operation under Part XIII; and

(b) a law made by the legislature of a State.

"Federal Law" means:

(a) any existing law relating to a matter with respect to which Parliament has power to make laws, being a law continued in operation under Part XIII, and

(b) any Act of Parliament.

In view of the above definitions, I would with respect say that the law contained in the National Land Code (Penang and Malacca) Order 1965 cannot be said to be included in the definition of law stated in Article 4 or Article 128 of the Federal Constitution. Apart from all that, it is my view that the High Court and indeed even subordinate courts have jurisdiction to determine any question affecting the provisions of the Federal Constitution, except where the matter comes under Article 4. This is clearly explained by Suffian F.J. in *Fernandez* v. *Attorney-General*[1] in the Federal Court. Suffian F.J. referred to the provisions of section 48(1) of the Courts of Judicature Act and to the change of the word "may" for the word "shall" in the third line thereof, and continued as follows: —

"Note well the mandatory word underlined. The appellant's solicitors in their written submission to us repeated the above text, but the word 'shall' has been amended by Act No. 35 of 1964 to read 'may'. So it is quite plain that the High Court has jurisdiction. But even without the amendment the High Court would be competent to give a ruling on this question, for the original text of section 48(1) of the Courts of Judicature Act was clearly inconsistent with the Constitution, the general scheme of which is to empower the High Court (subject to certain restrictions) to pronounce on the constitutionally of Federal and State laws."

I was a member of the court hearing the appeal in that case and there I expressed agreement with the judgment of Suffian F.J.

If I may recapitulate briefly as follows: — The declarations sought in this case cannot be said to come within the provisions of clauses 3 and 4 of Article 4 read together with Article 128 of the Federal Constitution. First, the law which is to be challenged is not a primary law made by the State legislature, and secondly the challenge will not be made on the ground that the maker has trespassed on the Federal sphere.

In the circumstances, in my opinion, the High Court has jurisdiction to deal with the matter, even though the question raised might have effect on any provisions of the Federal Constitution.

I would therefore dismiss the application with costs.

Application dismissed.

Solicitors: *Lim Kean Chye & Co.*

UHG v. DIRECTOR-GENERAL OF INLAND REVENUE

[A.C.J. (Gill J.) July 21, 1973]

[Kuala Lumpur — Originating Motion No. 42 of 1972]

Income Tax — Operator of taxi-cabs — Whether drivers of taxi-cabs employees — Deductions claimed for salaries of drivers and for diesel fuel — Taxis hired on rentals — Findings of fact by Special Commissioners — Whether can be supported by evidence — Case stated — Income Tax Act, 1967, ss. 91(1) & 140.

The Director-General of Inland Revenue had assessed the appellants on the profits made by them in the business as operators of taxi-cabs and had disallowed the expenditure alleged to have been incurred in respect of wages and payments for diesel fuel. On appeal the Special Commissioners held that the appellant had in fact hired out the taxis on rentals and had not paid wages or salaries to the taxi-drivers or paid for the diesel fuel. The appellant appealed to the High Court by way of case stated and the question of law for the opinion of the court was whether on the facts found by the Special Commissioners there was evidence to support their decision.

Held: there was evidence to support the finding of the Special Commissioners and they were right in upholding the disallowance by the respondent of the expenditure for wages and diesel fuel.

CASE STATED.

V. K. Palasuntharam for the appellants.

Zulkifli bin Mohamad (Federal Counsel) for the respondent.

Gill F.J.: By eleven notices of assessment dated June 5, 1970, the respondent levied additional income tax on the appellants for the eleven years of assessment from 1959 to 1969 inclusive in respect of the profits made by them in their business as operators of taxi-cabs within and outside the Kuala Lumpur Municipal limits. In doing so, the respondent disallowed the expenditure alleged by the appellants to have been incurred by them in the production of their income in respect of wages and payments for diesel fuel as shown in their accounts.

The appellants appealed to the Special Commissioners of Income Tax. Their appeal was initially fixed for hearing on April 28, 1971 when it was adjourned at the request of their first counsel to July 29 and then to September 2 when the hearing took place. On September 3 the appellants' counsel applied for an adjournment to discuss a settlement with the Department, but he withdrew from the case on the next date of hearing on September 13. The appellants then briefed another counsel who withdrew from the case without taking any part in the hearing of the appeal. At the hearing on December 6 to 10 two counsel appeared for the appellants, but they withdrew before the next hearing which was fixed for February 1, 1972 when it was adjourned to February 21 to enable the appellants to secure the services of another counsel. The next counsel for the appellants applied for an adjournment of the hearing until June or July, 1972. The application was refused. Yet another counsel appeared for the appellants at the hearing on February 21 to 22 but he withdrew from the case on February 23 when hearing continued with the managing director representing the appellants. On February 24 the hearing was adjourned to enable the appellants to get confirmation that another counsel would appear. No confirmation having been produced, the hearing was continued on February 24 and 25. On February 26 a counsel appeared and asked for an adjournment which was refused. The hearing was continued with the managing director appearing for the appellants and concluded on March 3. The Special Commissioners made their deciding order on March 6, 1972.

The issue before the Special Commissioners was the simple issue of disallowance by the respondent of the alleged expenditure by the appellants in the production of their income. In support of their case that the drivers of the taxi-cabs were their employees and that they paid for the diesel fuel, the appellants called twelve witnesses. The respondent called nine witnesses, three of whom were former taxi drivers of the appellants, to show that the taxis were in fact hired out to the drivers on daily rentals and that the hirers themselves paid for the diesel fuel. Six other former taxi drivers were made available for the appellants who elected not to call them. Evidence was produced that before the appellants installed a diesel pump in 1967 or 1968, the drivers bought fuel from other petrol kiosks out of their collections and that on their return to the garage they had to surrender their receipts for the fuel bought but that they were never reimbursed for what they had paid. There was also evidence that after the installation of the pump the appellants bought diesel in bulk and retailed it to the drivers at 80 cents a gallon. In addition to hearing evidence of witnesses, the Special Commissioners examined more than a hundred documentary exhibits which were put in at the hearing.

The findings of fact which the Special Commissioners made were that the so-called contracts of service drawn up between the appellants and the drivers were not valid contracts, being signed by the drivers under duress or undue influence, so that the drivers were in fact not employees of the appellants but independent contractors who hired the taxi-cabs from the appellants on payments of rentals, that the various books and records prepared and maintained by the appellants were in several material particulars fictitious and had no relation to facts, and that the audited accounts of the appellants for the eleven years in question were inaccurate and did not reveal the true financial position of the appellants at the dates on which they were drawn up.